

**FILED**

**DEC 10 2010**

**PATRICK E. DUFFY, CLERK**

**By** \_\_\_\_\_  
**DEPUTY CLERK, MISSOULA**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

ROBERT TOWN,	)	CV 09-07-H-DWM-RKS
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
SGT. ALVIN FODE,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Robert Town, proceeding pro se, brought this action pursuant to 42 U.S.C. § 1983, alleging Defendant Sgt. Alvin Fode used excessive force in violation of his Eighth Amendment rights. Fode moved for summary judgment arguing as a matter of law that Town cannot prevail on his claim. Pursuant to 28 U.S.C. § 636(b), the matter was referred to Magistrate Judge Strong, who issued Findings and Recommendation on November 5, 2010. Judge Strong found that the undisputed facts establish that the handcuffing at the heart of this action was

necessary, do not show that Fode acted with a sufficiently culpable state of mind, and no evidence supports Town's allegations that the amount of force applied was excessive. Accordingly, Judge Strong recommended the motion for summary judgment be granted and the case closed because a reasonable jury could not find that Fode used excessive force upon Town.

Town timely objected to the Findings and Recommendation on November 19, 2010, and is therefore entitled to *de novo* review of the specified findings or recommendations to which he objects. 28 U.S.C. § 636(b)(1). Despite Town's objections, I agree with Judge Strong's analysis and conclusions. Because the parties are familiar with the factual and procedural background, it will not be restated here.

Before reaching Town's objections, there is an outstanding motion that must be addressed. On December 7, 2010, Town moved for continuance in summary judgment. He seeks to introduce new medical evidence obtained on November 10, 2010. Town responded to Defendants' discovery requests on March 22, 2010. The summary judgment record closed on June 14, 2010. It was only after Judge Strong issued his Findings and Recommendations that Town obtained this additional evidence. The aim of submitting this new evidence is to stave off Judge Strong's recommendation that judgment be entered in favor of Defendants. To

have Town present an argument and evidence to Judge Strong, have Judge Strong make a recommendation based on that record, then allow Town to introduce new materials in conjunction with his objections to the recommendation would circumvent the Court's rules, judicial efficiency, and the Magistrates Act. See Greenhow v. Sec'y of Health & Human Servs., 863 F.2d 633, 638-39 (9th Cir. 1988) overruled on other grounds by United States v. Hardesty, 977 F.2d 1347 (9th Cir. 1992), cert. denied, 507 U.S. 978 (1993). The motion is denied.

As to the objections, Town first objects that Judge Strong over relied on Fode's affidavit and ignored other evidence in the record providing different accounts of the incident in question. Town specifically refers to Officer Steyh's affidavit, Investigator Crowe's report and other statements made by Fode. The objection is based on a flawed premise. Judge Strong's undisputed facts draw from various sources beyond Fode's affidavit, including Officer Steyh's affidavit and Investigator Crowe's report. See Findings 4-7. Even if that was not the case, Town has failed to identify how any of this other evidence in the record contradicts the undisputed facts as articulated by Judge Strong. After reviewing the record, I find no fault with Judge Strong's undisputed facts.

Next, Town objects that Judge Strong failed to consider facts related to his treatment prior to and after the handcuffing incident. These facts, Town insists,

are relevant as to whether Fode made false allegations, wrongly placed him in confinement, or refused him medical treatment. These additional claims, however, were already dismissed. (See dkt ## 8 and 10.) Thus, the objection is denied. The only material facts here are those concerning Town's excessive use of force claim based on the July 8, 2009 handcuffing incident.

Town also objects to Judge Strong's finding that, based on the evidence, Fode did not act with a sufficiently culpable state of mind. Town argues Judge Strong should not have reached this issue. The objection is not well taken because a defendant's state of mind is relevant to an excessive force claim. See Hudson v. McMillian, 503 U.S. 1, 7 (1992). In this same objection, Town also argues it is unclear if Fode possessed a culpable state of mind because there is no evidence that he is innocent. The objection misses the mark. Town carries the burden to show Fode violated his constitutional rights. With no evidence that Fode applied the handcuffs in a sadistic manner or was made aware that they were too tight, it is not improper to conclude that Town failed to establish that Fode possessed a culpable state of mind.

Finally, Town takes exception to Judge Strong's finding that the evidence fails to show excessive force was used here. Judge Strong drew this conclusion, in part, from the record not providing any details about an injury, medical treatment

or requests for such treatment. Town objects but fails to identify anything in the record before Judge Strong to the contrary.<sup>1</sup> I agree with Judge Strong. Given this record, a reasonable jury could not find that Fode used excessive force amounting to a constitutional violation.

I find no clear error in Judge Strong's remaining findings and recommendations.

### **ORDER**

Based on the foregoing,

IT IS HEREBY ORDERED that Judge Strong's Findings and Recommendations (dkt #36) are adopted in full.

IT IS FURTHER ORDERED that

1. Defendant Fode's Motion for Summary Judgment (dkt #16) is  
  
GRANTED;
2. Plaintiff Town's Motion for Continuance in Summary Judgment (dkt

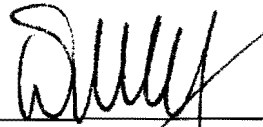
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<sup>1</sup>Along with his objections, Town submitted a November 10, 2010 letter from a Dr. Raymond A. Kaufman and photographs of what appear to be a man's wrist. Dr. Kaufman's letter provides that Town has a scar on his wrist consistent with an injury from handcuffs, and that the injury occurred over a year ago. (See dkt #37-2.) The photographs are of a man's wrist, but little else can be deduced from them. These materials cannot be considered by the Court because they are not a part of the summary judgment record, see L.R. 56.1(d), and were not before Judge Strong. See Greenhow, 863 F.2d at 638-39. Regardless, the letter and photographs do not provide meaningful details about any injury suffered during the July 8, 2009 incident, let alone show that medical treatment was sought due to the handcuffing incident.

#39) is DENIED;

3. The Clerk of Court shall enter judgment in favor of Defendants and CLOSE this case; and
4. The Clerk of Court shall have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith.

Dated this 10<sup>th</sup> day of December, 2010.



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Donald W. Molloy, District Judge  
United States District Court

